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No. 654

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, PETER F. HEIN, LAWRENCE F. SULLIVAN AS AND CONSTITUTING THE BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Petitioners,

v.

THE WOOD PRESERVING CORPORATION,

Respondent.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' RESPONSE TO RESPONDENT'S ADDITIONAL AUTHORITIES

Filed April 2, 1941.

GEORGE N. BEAMER,
The Attorney General of Indiana,
JOSEPH W. HUTCHINSON,
Deputy Attorney General,
JOSEPH P. McNAMARA,
Deputy Attorney General,
Counsel for Petitioners.

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As an answer to the "Respondent's Additional Authorities" filed on April 2, 1941, the petitioners respectfully submit the following:

1. The case, *Department of Treasury* v. *Crowder* (1936), 214 Ind. 252 (cited by respondent under the para-

graph designated as "1"), has been overruled by the Indiana Supreme Court in *Department of Treasury of Indiana* v. *Muessel* (March 18, 1941), 32 N. E. (2d) 596. The *Crowder* decision cited by the respondent refers with approval (214 Ind. at 256) to the leading case of *Miles* v. *Department of Treasury* (1935), 209 Ind. 172, 199 N. E. 372, 101 A. L. R. 1359, wherein the nature of the Indiana Gross Income Tax Act was before the Indiana Supreme Court. This precise question of the opportunity or benefit which was the subject-matter of the tax was not before the Indiana Supreme Court in the *Crowder* case and that court was not deciding that issue in the *Crowder* decision—but the issue had previously been determined in the *Miles* case, where the following significant language was utilized:

> *"We conclude that the tax in question is an excise, levied upon those domiciled within the state or who derive income from sources within the state, upon* the basis of the privilege of *domicile or the privilege of transacting business within the state,* and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon the basis of domicile as readily supports and justifies a tax upon the basis of the right to receive income within, or transact business under the protection of, the state. We feel that the weight of reason and authority sustains this view." (209 Ind. 172, at 188.)

2. In response to the paragraph designated as "2" of "Respondent's Additional Authorities": At the time of the oral argument respondent's counsel indicated that the extensive amendments contained in Chapter 117 of the Acts of 1937 had been made subsequent to the *Adams* decision. As a matter of fact, Chapter 117 of the Indiana

Acts of 1937 was approved March 9, 1937, whereas this court handed down its decision in *J. D. Adams Manufacturing Company* v. *Storen* on May 16, 1938—over a year later.

It is true that Chapter 140 of the Indiana Acts of 1941, which will become effective on January 1, 1942, did embrace a few changes in the Indiana Gross Income Tax Act, and that the title was not amended in the 1941 session. However, this is not a sufficient basis for the unsupported statement of the respondent that:

> "* * * and must, therefore, have confirmed the construction of this court in the Adams case."

First, it should be noted that the sufficiency of the title of the Act was not before this court in the *Adams* case.

Second, counsel for respondent ignores the fact that the term "received," a modification of which is used in the title of this Act, is a broad, generic term which embraces within its concept the more limited, specific term, "derived." Respondent objects because the Act in taxing non-residents does not use the word "receive," but imposes the tax "upon the gross income *derived from sources within Indiana.*" Reference to Webster's New International Dictionary, (2d) Ed., Unabridged, (Merriam, 1934) indicates that the word "derived" means:

> "To receive, as from a source or origin."

From this accepted standard dictionary definition, it is at once apparent that whether the word "received" or the word "derived" is utilized by the draftsmen of the Act in its title is of little importance, since the net result would be the same, and that the more prudent course to follow would be to use the broad, generic term, i.e., the word "receive" and thus avoid controversy. *Third*, the

statement erroneously assumes that this court in the *Adams* decision (304 U. S. 307) did not recognize that the opportunity forming the subject-matter of the tax as applied to non-residents was the deriving of gross income from sources within Indiana. The contrary is true. See: 304 U. S. 307 at 308 and 310—also dissent at 316.

The fact that the Indiana Legislature did not amend the title to the Act after the *Adams* decision can mean but one thing: That the Legislature was confident that the provisions of section (2) which are tailored to fit the situation of non-residents and which specifically limit the tax imposed upon non-residents to the deriving of "gross income from sources within this state," were adequately within the title of the Act. Had the title been amended, *then* the respondent might have been able to argue that the Indiana General Assembly interpreted the title as not being broad and generic enough to include the more specific provisions relating to non-residents. But the fact that the title was *not* amended indicates that the General Assembly of Indiana felt confident that the title was broad enough. Also respondent appears to be oblivious to the fact that the objection that the title of the Act is defective within the meaning of Section 19 of Article IV of the Indiana Constitution (1851) is not available to respondent since the objection was not pleaded. It cannot be resorted to as an aid in statutory construction since Sections 2 and 9 (a) of the Indiana Gross Income Tax Act of 1933 are so clear and unambiguous as to preclude the resorting to any aid to statutory construction.

(Incidentally, the title of the Act was assailed under the Indiana Constitution in the case of *Miles, et al.* v. *Department of Treasury* (1935), 209 Ind. 172—and although the Indiana Supreme Court in that case concluded:

> "that the tax in question is an excise, levied upon those * * * who derive income from sources within the state, upon * * * the privilege of transacting business within the state * * *."

the court did not feel constrained to hold or to observe that the Act in its application to non-residents was invalid as being beyond the purview of the title to the Act.)

3. Respondent adroitly presents a fragment of the letter in that part of its "Additional Authorities" identified as "3." The entire letter indicates that the problem under consideration was diametrically different from the problem presented in this cause of action. There the director was writing with reference to whether bare delivery from a point outside of Indiana into the state, standing alone and by itself, was sufficient to permit the state to tax a non-resident not doing business within the state measured by the income derived from the sale resulting in such a naked delivery. In this case we are dealing with a factual situation wherein (1) respondent was admitted to do business in Indiana and normally had one agent there; (2) respondent's agent made arrangements in Indiana with producers there to acquire ties, later sold to the railroad; (3) the respondent acquired the property in Indiana; (4) the contract of sale was entered into within Indiana; (5) the delivery was made to the purchaser within the State of Indiana; and (6) after delivery at a point in Indiana nothing remained to be done with reference to the sales transaction by the respondent beyond the territorial boundaries of the State of Indiana. It should also be noticed that the quotation, a part of which respondent has isolated and presented as an additional authority, is not a quotation from the Act itself, nor is it a quotation from an official regulation, nor from

a rule, nor an administrative ruling or a decision. It is from a letter having to do with a hypothetical situation which was *not* similar to the situation in this cause. The entire letter reads as follows:

> "We advise that while Indiana was represented on the Committee which drafted the uniform regulation on interstate commerce, it was not adopted by this state.
>
> "Eventually this regulation or one similar may by adopted.
>
> "We did not choose to adopt the present regulation which is based on the McGoldrick decisions until the theory promulgated has been subjected to further test. We understand that both Illinois and Missouri are involved in litigation at the present time with respect to this regulation. We are also of the opinion that the *Sears, Roebuck & Company* case in Iowa may reveal to a great extent the power of a state to tax incoming shipments.
>
> "Under the Indiana Gross Income Tax Act we doubt if taxation can be predicated on mere delivery in the state and hence we attempt to tax foreign corporations on sales made *into* Indiana only when they are licensed in Indiana and maintain substantial offices or establishments in the state which are responsible for the sales being made.
>
> "We do, however, attempt to tax incoming shipments in cases where the out-of-state firm has facilities within Indiana for filling orders. At the present time this question is being tested by the International Harvester Company and the Ford Motor Company."

4. The respondent attempts to escape the plain, undisputed provisions of Section 9 (a) of Chapter 50 of the Indiana Acts of 1933 by stating

"No reporting was ever required under this Section by Regulation 190."

(1) Regulation 190 did not deal (nor purport to deal) with income derived from a source outside of the State of Indiana except as such income might be a component and integral part of commerce between the states. (2) A section of the statute cannot be repealed by an administrative regulation—but it is important to note that Regulation 190 does not attempt to repeal or to alter Section 9 (a) or Section 2 of the Taxing Act, both of which relate (insofar as non-residents are concerned) to income derived from sources within the State of Indiana and income derived from sources outside the State of Indiana. Respondent contends that the tax is invalid because its measure was derived from sources outside of the State of Indiana, thereby violating the Fourteenth Amendment to the Constitution of the United States of America. Consequently, since Regulation 190 in no wise affects the respondent's duty to make the separation or apportionment provided for in Section 2 and in Section 9 (a) of Chapter 50 of the Acts of 1933, any reference to Regulation 190 is fruitless.

Respondent's reference to Regulation 193 overlooks the fact that that Regulation is expressly limited in its application *to residents* of the State of Indiana. Respondent was a *non-resident*. It therefore was governed by the clear and plain provisions of Section 9 (a) of the Taxing Act.

The last literary paragraph of respondent's "Additional Authorities" contains the following unsupported statement:

"(c) The apportionment provision was never applied by the officials and was repealed in 1937."

It is true that a part of Section 9 (a) was omitted in the amendments adopted in 1937; however it is extremely important to note that all of the taxes here involved were assessed for taxing periods *prior* to 1937; and that, consequently, the respondent should not be permitted to avail itself of any statutory change occurring subsequent to the pertinent taxing periods. But the important thing to note is that respondent's statement that the "apportionment provision was never applied by the officials" is *not* supported by the evidence, by the findings, by the record, nor can it be supported by any official regulation adopted by the Department of Treasury of Indiana, nor in any other manner. It is a gratuitous statement wholly outside of the Record and unsupported by it.

Respectfully submitted,

GEORGE N. BEAMER,
The Attorney General of Indiana,

JOSEPH W. HUTCHINSON,
Deputy Attorney General,

JOSEPH P. MCNAMARA,
Deputy Attorney General,

Counsel for Petitioners.

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